Published June 13, 1894.

Supreme Court Syllabi

6982.

E. A. Barber vs. C. Van Horn.

Error from Allen County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Every partner is a general agent of the firm to carry out and transact its business in the usual and ordinary way.

2. It is the general principle relating to commercial or trade partnerships that each partner is the lawful agent of the partnership in all matters within the apparent scope of the business. Deitz vs. Regnier, 27 Kas., 94.

3. The knowledge of one partner concerning partnership matters is constructively the knowledge of all the members of the partnership, although the other members are actually ignorant thereof.

4. Where a private banking firm obtains money for the purpose of carrying on its usual and ordinary business from another person with the knowledge of all the members of the firm, and executes a firm note therefor, and afterward one of the partners of the firm withdraws from the assets of the firm sufficient moneys to pay the note and falsely informs the other members of the firm that the note is paid, and such note is shown by the books of the firm to be satisfied and canceled, but is not in fact paid off, and such partner, without the knowledge of the other members of the firm, continues to pay interest upon the note, and when due, renews the same in the name of the firm, the new note, if the payee has no notice to the contrary, is binding upon the firm as a valid obligation thereof.

5. The fact that the partner signed his individual name to a renewal of the old note, given by the firm, before signing that of the firm, may be considered by the trial court in determining whether or not the payee had reason to know the new note was executed without the knowledge of the other partners, or in fraud of their rights.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7103.

Lorenzo D. Stephenson, et al. vs. Albert H. Elliott.

Error from Jackson County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where the grantee of a deed enters into an agreement with the grantor that he will assume and pay all of the mortgages and encumbrances on the land conveyed at the time of the execution of the deed, but by the mutual mistake of the parties the deed in its written form does not express this contract, equity has jurisdiction to reform the written instrument so as to conform to the intention, agreement and understanding of the parties.

2. Where the grantee, as a part of the consideration for the conveyance of a tract of land, accepts a deed which provides that he "assumes and agrees to pay all the claims, mortgages and interest of whatsoever nature of record at the date of the deed," he becomes thereby personally liable to the mortgagees to pay the mortgages on the premises so conveyed to him.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7189.

Harry Talcott vs. The First National Bank of Larned.

Error from Pawnee County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. A pass book given by a bank to a depositor is not a written contract but is *prima facie* evidence that the bank received the amounts at the dates therein stated and binds the bank like any other form of a receipt and is open to explanation by evidence *aliunde*.

2. When an appeal is taken to the district court from the judgment of the justice of the peace, and full pleadings are filed in that court, the parties are bound thereby; and if it appears from the answer of the defendant that no counter-claim, set-off or other defenses is alleged, and it is shown by the pleadings, including the allegations in the answer of the defendant, that the plaintiff is entitled to judgment, the court may render judgment, upon the pleadings on the motion of the plaintiff.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7134.

W. M. Benham and A. T. Lea vs. J. B. Smith.

Error from Cherokee County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. The case of Hill vs. Bank, 42 Kas., 364, followed.

2. A certain promissory note payable to S. and signed "Wm. M. Benham, President Odd Fellows Hall Association; A. T. Lea, secretary," was sued upon by S., the original payee to hold Benham and Lea personally liable. The answer alleged that the note was the obligation of the Odd Fellows Hall Association and referred to a mortgage given by the association to S. upon certain real estate to secure the note. The mortgage concluded as follows: "In witness whereof the said party of the first part has consented this deed to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the day and year aforesaid. W. M. BENHAM, President Columbus Odd Fellows Association. Attest: A. T. LEA, Secretary. *Held*, That B. & L., the president and secretary of the association could introduce the mortgage and also parol evidence to show they signed for the association only and that it was the intention of all the parties to the note to make it the obligation of the association.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7123.

Union Pacific Town Site Company vs. Charles Page, et al.

Error from Shawnee County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

An agent of a town site corporation engaged in building and promoting a town has no implied authority to purchase lumber and other supplies for private individuals to construct buildings upon their own lots, purchased by them from the town site company, and to make the corporation liable for such lumber and supplies.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6975.

Bradley, Wessler & Co., et al., vs. Frank Borin.

Error from Rooks County.

MODIFIED.

SYLLABUS. BY THE COURT. HORTON, C. J

In an action for damages on account of the wrongful levy of an attachment upon goods, wares and merchandise, special damages for loss of profits not alleged in the petition can not be recovered.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9545.

State ex rel., Alfred J. Harwi, vs. W. D. Webb, Judge, et al.

Original Proceedings in Mandamus.

WRIT DENIED.

SYLLABUS. BY THE COURT. HORTON, C. J

With a view to substantial justice between the parties, a trial court, even after a motion for a new trial is overruled, may reserve for future consideration the question whether judgment should be entered upon the verdict of the jury. Sec. 409, Civil Code.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7151.

George P. Cole vs. J. M. Bower.

Error from Cowley County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where it is urged that errors of law occurred upon the trial, and the record shows that the motion for a new trial was overruled, but neither the motion, nor the grounds contained therein are preserved, the supreme court can not review the same.

2. "A party who has given a receipt admitting payment in full has the right always to show by parol evidence that it was given by mistake, and that it was untrue." Clark vs. Marbourg, 38 Kas., 471.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

059.

Thomas A. Kirk vs. John G. Goodwin, et al.

Error from Wyandotte County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where a contractor enters into an agreement with the equitable owner of certain lots to furnish material and labor for the improvement of the same, and subsequently files a mechanic's lien upon the lots, alleging therein that he has furnished the material and performed the labor in accordance with his contract with the equitable owner and that the person contracted with is the owner of the lots, and afterwards in an action brought by the contractor against such equitable owner to recover a personal judgment against him for the material and labor furnished and to foreclose his mechanic's lien upon the lots—the party, who has the legal title, is also made a defendant in that action, and such contractor obtains a personal judgment against the equitable owner for the full amount of his claim for material and labor and a foreclosure of his mechanic's lien with a decree barring therein all the title and interest of the defendant holding the legal title, and thereafter collects a part of the judgment from the proceeds of the sale of the lots, and then subsequently brings his action to recover a personal judgment against the party, who had the legal title at the date of the former judgment, upon the ground that such party agreed to become responsible and pay the contractor for his work, if he would finish the same, such contractor is not entitled to recover a new or further judgment against the party, who held formerly the legal title and was one of the defendants in the prior action.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7109.

The Farmers' Stock Breeding Association vs. Adam Scott, et al.

Error from Norton County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Representations made by a seller to a purchaser after a contract of sale has been consummated, are not actionable.

2. To maintain an action for fraudulent representation made to induce a sale, the representation must have been known to be false by the person making it, or at least he must have made it without reasonable grounds for believing it to be true.

3. Where the seller gives to the purchaser a written warranty, the purchaser can not maintain an action upon a contract of warranty not included in such written instrument received by him.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7095.

L. F. Crosby vs. W. P. Wilson, as Sheriff of Labette County.

Error from Labette County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. A general exception to an entire charge of a court, where any portion of the same is correctly given, is insufficient. State vs. Wilgus, 32 Kas., 136.

2. In order to preserve in a case-made all the evidence introduced upon the trial a statement to that effect should be inserted in the case itself, and not in the certificate of the trial judge. Eddy vs. Weaver, 37 Kas., 540.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7088.

Tootle, Hosea & Co. vs. C. R. Rice, et al.

Error from Pratt County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. The property of a co-partnership is the joint property of the partners and unless all the partners consent to do so, one partner can not dispose of the property of the partnership to satisfy his individual debts.

2. The consent of a partner to the sale and transfer of the joint property of the partnership by one partner to satisfy his individual debts must be established in a satisfactory monner, not resting upon vague and uncertain inferences; otherwise the rights of the non-consenting partner may be improperly sacrificed and the creditors of the partnership unjustly deprived of a priority of payment out of the partnership assets.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7168.

In the Matter of the Estate of E. B. Mallory, Deceased, and Fannie Mallory, Administratrix, vs. The Burlington & Missouri River Railroad Company in Nebraska.

Error from Atchison County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. Where a person dies intestate who is not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of the state has no jurisdiction to issue letters of administration on the estate of such intestate; and where letters are issued, the acts of the court in doing so are utterly null and void.

2. Letters so issued without authority may be set aside by the court in which they are issued upon its own motion, or such action may be taken at the instance of anyone interested in the administration; and where an action has been brought by the administrator against a railroad company to recover damages for an injury alleged to have caused the death of the intestate, the company has sufficient interest to make it a competent party to institute proceedings for a revocation of the letters of administration.

3. Where letters of administration are issued without jurisdiction, and the probate court, upon a hearing, determines and orders that they be declared null and void, the person illegally appointed as administratrix is not entitled to appeal from such an order without giving the appeal bond required from ordinary appellants.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7190.

Otis L. Thisler vs. J. J. Miller.

Error from Dickinson County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. A judgment in favor of the owner for the recovery of a part of a number of animals from an officer who had wrongfully seized them upon an execution against another than the owner, where all of the animals were seized and taken from the possession of the owner at the same time and upon the same writ, is a bar to the maintenance of another action by the owner against the officer to recover the remaining animals so seized and detained.

2. A motion for a new trial on the ground of newly discovered evidence will not be sustained where it appears that the testimony relied upon was within the knowledge of the party, who was absent from the trial, but who had failed to communicate the facts to the attorney who appeared in his behalf.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7136.

J. C. Ard vs. C. H. Pratt.

Error from Allen County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON J

In 1873, M. obtained a patent from the United States for a tract of land, but never took actual possession of the same. A., claiming title, went into possession of the same land in 1873, but never paid any taxes thereon, and this possession, which was exclusive and adverse, continued for more than fifteen years, and until the title of M. was extinguished by adverse possession. The taxes on the land for 1883 were not paid, and it was sold to a stranger for taxes, and a tax deed therefor was issued in 1887. In 1889, and after the statute of limitations had run against the patent title, M. purchased the outstanding tax title and subsequently conveyed the same to P., who brought an action to recover the land from A. *Held*, That as M. owed no duty to A. to pay the taxes, and as their claims to the land were antagonistic, M. was not disqualified to purchase the outstanding title nor was the grantee of M. precluded from relying upon the same as against the adverse possession and claim of A.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9405.

Alfred Blaker, Administrator, etc., vs. Hood & Kincaids and O. E. Morse, Receiver.

Error from Linn County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. The provisions of the constitution authorizing the organization and control of banks of circulation do not limit the legislative power nor operate to prohibit the enactment of laws imposing reasonable regulations upon banks of deposit and discount.

2. The act providing for the organization and regulation of banks [Chap. 48, laws of 1891] is held to be within the scope of the police power of the state and not an unconstitutional infringement of private rights.

3. The act does not contravene the constitutional provision which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7183.

J. N. Stewart vs. M. E. Fowler & Co.

Error from Shawnee County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1, Under a contract whereby brokers agreed with the land-owner to find a person with whom the owner would make a contract for the sale of his land at a fixed price and upon terms satisfactory to himself at a stipulated commission, the brokers found a purchaser who contracted with the owner for the land at the price agreed upon, payments to be made in installments, and giving the owner the option in case of any default of the purchaser to declare the contract and the payments thereunder forfeited. The purchaser was then ready, willing and able to comply with the conditions of the contract, and subsequently made two of the payments provided for, but defaulted in the others, and the owner, instead of enforcing the contract, chose to declare a forfeiture and to retain the payments which had been made, but declined to pay the commission. *Held*, That the brokers had earned their commission when the purchaser was found by them and accepted by the owner, and that they cannot be deprived of the same because the deferred payments were not made by the purchaser and the terms of the contract fully carried out.

2. A finding of the jury, based upon sufficient testimony, to the effect that the landowner accepted the services performed by the brokers as a compliance with the conditions